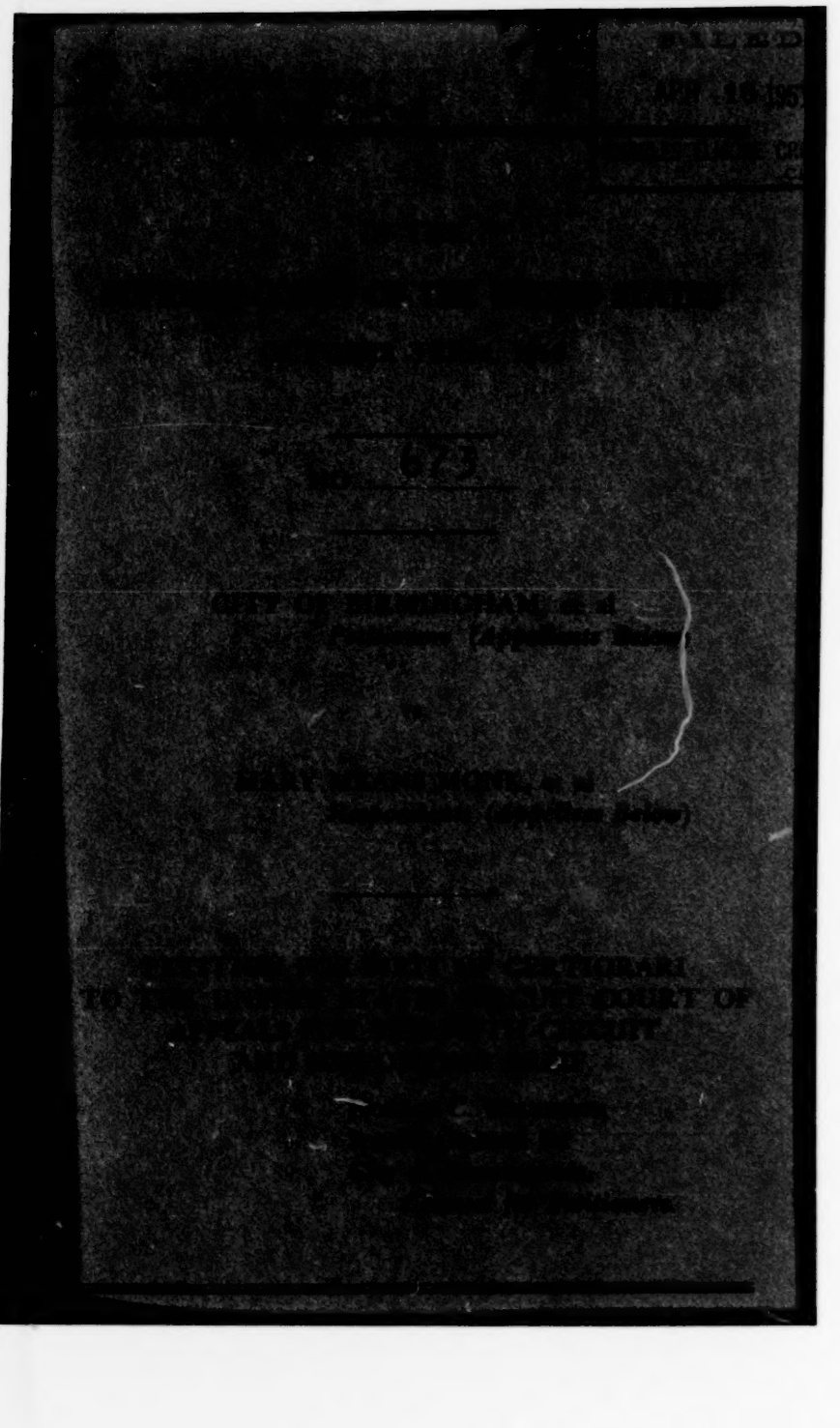

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

NO.....

CITY OF BIRMINGHAM, et al
Petitioners (Appellants Below)

vs.

MARY MEANS MONK, et al
Respondents (Appellees Below)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES

Your petitioner, the City of Birmingham, a municipal corporation, in the State of Alabama, and James W. Morgan, as Commissioner for Public Improvements, and H. E. Haygood, as Birmingham Building Inspector, respectfully prays that a writ of certiorari issue out of this Honorable Court to review a judgment of the United States Circuit Court of Appeals for the Fifth Circuit rendered on December 19, 1950 in the cause of the City of Birmingham, et al, Appellant vs. Mary Means Monk, et al, Appellee and numbered 13158 in said court. Application for rehearing was filed in said cause within the time prescribed by law and overruled on January 25, 1951, Russell Circuit Judge Dis-

senting. Judgment of said Circuit Court of Appeals affirmed the judgment of the United States District Court for the Southern Division of the Northern District of Alabama adjudging and declaring the zoning ordinances of the City of Birmingham, Section 1604 and 1605 of the Municipal Code and Ordinance No. 709-F violative of the Fourteenth Amendment to the Constitution of the United States and enjoined their enforcement.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The City of Birmingham is an Alabama municipal corporation. About 40% of its population are Negroes.

In 1915 the Alabama Legislature empowered Birmingham to prevent conflict and ill feeling between the races and delegated to Birmingham "the full, complete and unlimited police power" of the State of Alabama. Acts 1915, Page 294, Section 6.

In 1923 the Legislature empowered Birmingham to establish a zoning commission and to classify inhabitants by zoning regulations, "which will not discriminate in favor or against any class of inhabitants." Alabama Code 1940, Title 62, Section 711.

Birmingham thereupon employed the nationally known engineering firm of Morris Knowles of Pittsburgh, Pennsylvania, to prepare a comprehensive plan for zoning Birmingham.

In 1926, after several years of study and numerous public hearings in which all races, classes and interests were heard at length, Birmingham was zoned by a basic zoning ordinance which is now Chapter 57 of the General City Code of Birmingham, 1944. *This ordinance* provides for equitable, residential segregation.*

Property not zoned as commercial, light or heavy industrial, is zoned white residential or negro residential. The residential districts are in turn sub-divided into A-1 white residential and B-1 negro residential, A-2 white residential and B-2 negro residential.

A-1 is single family, white. A-2 is single family, negro. B-1 is multiple family, white. B-2 is multiple family, negro.

With minor and unimportant exceptions, the Ordinance makes it unlawful for a negro *to use or occupy* a building in a white residential district and for a white person *to use or occupy* a building in a negro residential district.

There is no inhibition against whites owning negro property or negroes owning white property. The restriction is on the use and occupancy.

More than thirty areas or communities, in Birmingham have been zoned negro residential, corresponding to a similar number of communities or areas zoned white residential.

The negro areas are from 90 to 92 per cent occupied. From 8 to 10% of the territory in each negro residential district is vacant and available for improvement. The negro does not need to invade white territory in order to have a home in Birmingham on any type of property available to whites or blacks for residential purposes.

In 1949 Birmingham adopted a supplementary zoning ordinance,* known as Ordinance No. 709-F, in which the City Commission, its legislative body, made the following finding of fact:

"ORDINANCE NO. 709-F"

"BE IT ORDAINED By the Commission of the City of Birmingham that:

Section 1. The Commission finds as a matter of fact that:

---

*Set out in the Appendix.

(a) From the date of the original settlement of this City unto the present time it has been the invariable custom, supported for most of that time by municipal law and universally observed, to require white and colored residents to live in separate residential areas; and

(b) That when attempts have been made by members of one race to enter for purposes of a permanent residence into an area commonly recognized as set aside for members of the other race, violence, disturbances of the peace, destruction of property and life has resulted almost without exception; and

(c) This Commission further finds from its knowledge of present conditions and public sentiment in this City that in the event attempts shall now or in the foreseeable future be made by members of one race to establish residences in areas heretofore regarded as set apart for the residences of members of the other race, breaches of the peace, riots, destruction of property and life will follow; and

(d) That neither the City of Birmingham nor any other law enforcement agency is able so completely to police, supervise and safeguard the person and property of persons attempting to establish a residence in an area not commonly recognized as an area to be occupied by members of the race to which such person belongs, as to prevent injury to such persons, members of his family, third parties in the area affected, and destruction of property; and

(e) That the Zoning ordinances of the City of Birmingham now in effect do substantially and fairly well delineate those areas historically and generally regarded as available for residences and occupation by members of the white and colored races; and

(f) That this ordinance is necessary to preserve the peace of said City and to safeguard the property and safety of its citizens and of the public in general."

This ordinance makes it a misdemeanor for whites to reside in negro residential sections and for negroes to reside in white residential sections.

Mary Means Monk, a negro, applied for a building permit to build a house on a lot in Block 37, which she proposed to occupy as a residence. Her lot is in a white residential district—a district which has been zoned white since 1926. The permit was refused because the use to which she proposed to make of the property was a use prohibited by the zoning ordinances of the City. She thereupon filed a proceeding in the United States District Court at Birmingham, on behalf of herself and other negroes, in which fourteen other negroes joined, to enjoin enforcement of the zoning ordinances, and for a declaration that they deny equal protection of the law, and for that reason are void.

Birmingham undertook to support its zoning ordinances in the District Court, by averring, R. 19-30, and undertaking to prove, R. pp. 94, 95, 96, 98, 121, 123, 127, 139, 154, 155, 160, 163, 164, 165, 174, 175, 180, 181, 183, 184, 188, 214, 249:

(1) Whites and negroes in Birmingham have abided by the classifications established by the zoning board for more than twenty years.

(2) This arrangement has been highly successful. It has alleviated friction and racial tension, and contributed to the public peace and public welfare to a marked degree.

(3) An overwhelming majority of whites and blacks in Birmingham favor the residential segregation established by the zoning ordinances.

(4) Thousands of whites have built homes in white sections and thousands of negroes have built homes in negro sections relying upon the zoning classifications established by the zoning board, which have been accepted by the members of both races for more than twenty years, and " * * * thousands of property owners in Birmingham, white and colored alike will suffer irreparable injury and damage and the City of Birmingham, will suffer irreparable injury and damage if the plaintiffs are allowed or permitted to

upset or overturn the arrangement that has prevailed in the City of Birmingham for more than twenty years, and defendants aver it would be inequitable to disturb the aforesaid arrangement which is essential to peace and order and the life and property values in the City of Birmingham."

(5) There is a "clear and present danger" of a race war in Birmingham, and of jeopardy to the lives and property of a large number of whites and blacks, and to the public peace and order if Mary Means Monk and other negroes are allowed to live in a white residential section in Birmingham.

(6) That no amount of police protection that the City of Birmingham or the State of Alabama is able to afford can remove this clear and present danger or avert the consequences.

(7) Residential property values in Birmingham, white and black alike, will immediately depreciate in value from twenty-five to fifty percent if the zoning law is nullified and as a result municipal revenue (from ad valorem taxes on residential property) will be diminished so that Birmingham will be unable to render the necessary fire, police, health, street and light service to whites and blacks in Birmingham.

(8) Equitable, residential, segregation results in less miscegenation.

(9) The human right of whites and negroes in Birmingham to peace and order, stabilized property values, essential municipal services, in short, their right to life, liberty and the pursuit of happiness in Birmingham is superior or paramount to the right of any individual to use or occupy certain property or a home.

The District Court rejected all of these considerations as immaterial and declared the zoning laws invalid and enjoined their enforcement. The Circuit Court of Appeals, Fifth Circuit, by a two to one vote, Russell Circuit Judge dissenting, affirmed the judgment of the District Court.

II.

OPINION BELOW

The majority and dissenting opinions in the Circuit Court of Appeals is reported in 185 Fed. 2d. 859 and for convenience is set out in the appendix. The opinion of the District Judge is reported in 87 Fed. Supp. 538.

The majority opinion is grounded upon *Buchanan vs. Warley,* 245 U. S. 60, and a line of cases following it, in which no comprehensive zoning law, establishing equitable, residential segregation of proven worth to whites and blacks for nearly a quarter of a century was involved.

The thing that distinguishes this case from *Buchanan v. Warley,* and all similar cases is, that in this case, the municipality, which is a branch or arm of the state, has made an honest, intelligent effort, to balance the interests of the community against the inconveniences to the individual of restricting the right to occupy property in a particular locality for residential purposes. *Thornhill v. Alabama,* 310 U. S. 88. The zoning law is comprehensive, equitable and elastic. *It is* predicated on the idea that the attendant circumstances furnish a basis for restraint by the state.

Giboney v. Empire Storage & Ice Co., 336 U. S. 490.
Hughes v. Superior Court, 339 U. S. 460.
International v. Hanke, 339 U. S. 470.
Building Service Employees International Union v. Gazzam, 339 U. S. 532.

Zoning is striking a balance between the constitutional element of occupying property for residential purposes and the power of the state to protect the interests of the community.

The majority opinion mistakenly refers to "similar statutes" being held invalid in other jurisdictions. An examination of the statutes involved demonstrates that the offending statutes were arbitrary attempts to work a hardship

instead of equitable efforts to enact social and economic legislation reasonably deemed necessary to preserve Constitutional Government itself.

III.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Title 28, Section 1254 of the Judicial Code effective September 1, 1948 and Rule 38 of the revised Rules of the Supreme Court of the United States, U. S. C. A. Title 28, Rules, page 66.

IV.

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment to the Constitution of the United States inhibit social and economic legislation by a municipal corporation in the State of Alabama necessary to the preservation of Constitutional Government in Birmingham?

2. Is the right of an individual to occupy property in a certain area in Birmingham, for a home, superior and paramount to the right of all the citizens in the city to peace and order, stabilized property values, and to the pursuit of happiness, or, is the right of all citizens in Birmingham to peace and order, stabilized property values, and to the pursuit of happiness, superior and paramount to the right of an individual to occupy a particular piece of property for a home?

3. Does the Fourteenth Amendment restrict the police power to such an extent that Birmingham cannot work out the best possible solution of the race problem in that city?

4. Is equitable, residential segregation prohibited by the Fourteenth Amendment to the Constitution of the United States?

V.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals strikes down administrative action of the City of Birmingham of more than twenty years standing, of proven worth and benefit to whites and blacks alike, and if not reversed constitutes an unwarranted and burdensome intrusion into the realm of of local orderly, social, regulations as well as a confiscation of residential property values in Birmingham without compensation and the robbery of thousands of the protection vouch-safed to them by protective, restrictive, municipal regulations. It holds, in short, that equitable residential segregation in Birmingham must be overturned even though that means,

(a) Serious impairment of every needed municipal function.
(b) Irreparable injury to white and black owners of residential property.
(c) Constant exposure to the menace of race riots.
(d) Increased racial tension.

1. The Circuit Court of Appeals for the Fifth Circuit has decided an important question of federal constitutional law with respect to the applicability of the Fourteenth Amendment to the Constitution of the United States to State laws establishing equitable residential segregation which has not been but should be settled by this Court.

2. The matter presented is of tremendous importance to the citizens of the largest city in Alabama. The tons of riot equipment stored in the arsenal in Montgomery, the armory in Birmingham and armored trucks equipped with tear gas and machine guns can only *suppress* race riots. Only equitable residential segregation fairly administered will *prevent* them. The Commission of the City

of Birmingham and its predecessors have wrestled with the problem for years. There have been killings, bombings and the destruction of life or property every time a negro has attempted to take up a residence in a white residential section and in a number of instances where white foreigners have attempted to take up a residence in a negro neighborhood.

3. The opinion of the majority in the Circuit Court of Appeals is not in harmony with the decisions of this Court on social and economic legislation. It is probably in conflict with the principles laid down in applicable decisions of this Court which are: *Cantwell v. Connecticut,* 310 U. S. 296; *Reinman v. Little Rock,* 237 U. S. 171; *Hadacheck v. Sebastian,* 239 U. S. 394; *Pierce Oil Co. v. Hope,* 248 U. S. 498; *Euclid v. Ambler Realty Co.,* 272 U. S. 365; *Oyama v. California,* 332 U. S. 633; *Hirabayashi v. U. S.,* 320 U. S. 81; *Korematsu v. U. S.,* 323 U. S. 214; *Muller v. Oregon,* 208 U. S. 412; *Jacobson v. Massachusetts,* 197 U. S. 11; *Buck v. Bell,* 274 U. S. 200; *West Coast Hotel Co. v. Parrish,* 300 U. S. 379; and *Plessy v. Furguson,* 163 U. S. 537.

4. The Circuit Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's supervision.

VI.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In affirming the judgment and decree of the United States District Court for the Northern District of Alabama.

2. In holding that Birmingham zoning ordinances, Sections 1604 and 1605 of the Birmingham Municipal Code of 1944 and Ordinance 709-F were each unconstitutional.

3. In enjoining the enforcement of each of the zoning ordinances, separately and severally, of the City of Birmingham.

4. In affirming the judgment of the United States District Court for the Northern District of Alabama enjoining and restraining the City of Birmingham, its City Commissioners, officers, agents, servants and employees from directly or indirectly enforcing or attempting to enforce or attempting to do any other act under the color of Sections 1604 and 1605 of the general city code of the City of Birmingham or Ordinance No. 709-F of said City, adopted on the 9th day of August, 1949, or any other similar ordinances establishing or maintaining restrictions as to residential occupancy based on race or color.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding that Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court had in the Case numbered 13158, City of Birmingham, et al, appellants vs. Mary Means Monk, et al, appellees to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States and that the judgment therein of said United States Circuit Court of Appeals for the Fifth Circuit be reversed by this Court and for such other relief as to this Court may seem proper.

HORACE C. WILKINSON,
Special Counsel for the
City of Birmingham, Alabama
Attorney for Petitioners

APPENDIX

Sec. 1604. Occupancy in "A-1" and "B-1" residence districts.

In "A-1" and "B-1" residence districts, no building or part thereof shall be occupied or used by a person of the negro race; provided, however, that this section shall not be interpreted to prohibit any of the following:

(a) Use or occupancy by a negro servant, chauffeur or other employee, when the employer resides in the same building or in a building upon the same lot.

(b) Use or occupancy by any person, who, on August 4, 1926 was the owner of the used or occupied building or of the lot upon which such building may be erected, or who at said time shall have contracted to purchase the same by a valid and enforceable contract of purchase, or by his successor in title by will or descent.

(c) Use or occupancy by a member of the immediate family, or servant, lodger, boarder, lessee or tenant of any person described in paragraph (b) at any or all times during his concurrent ownership and residence of, in or on the building or lot.

(d) Use or occupancy during the period of the tenancy or lease by a life tenant, lessee for a term of years or other lessee of the used or occupied building or lot, such tenant or lessee being of the negro race, or by the successor in title of any such lessee by will or descent, in cases in which the tenancy or lease was created before August 4, 1926 and is unexpired and in force and effect.

(e) Use or occupancy by a person described in paragraph (d) during the period of an extension or renewal of any such lease, in cases in which the right of renewal or extension was created previous to, and was in force and effect on August 4, 1926.

(f) Use or occupancy by a member of the immediate family, or servant, lodger, boarder, lessee or tenant of any

person described in paragraph (d) at any or all times at which both the tenancy, lease, renewal or extension described in paragraph (d) and (e) shall be in full force and effect, and said person himself resides in or on the building or lot.

(g) Continuance, after August 4, 1926, of the residential use of occupancy of a building by persons of the negro race, in any case in which such building was used or occupied for residential purposes by persons of the negro race prior to August 4, 1926, or, if such building was vacant at said time, then in any case in which the last such use or occupancy previous to said time was by persons of the negro race. (Ord. 1101-C, Sec. 9).

Sec. 1605. Occupancy in "A-2" and "B-2" residential districts.

In "A-2" and "B-2" residence districts, no building or part thereof shall be occupied or used by a person of the white race; provided, however, that this section shall not be interpreted to prohibit any of the following:

(a) Use or occupancy by a white servant, chauffeur or other employee when the employer resides in the same building or in a building upon the same lot.

(b) Use or occupancy by any person who, on August 4, 1926, was the owner of the used or occupied building or of the lot upon which such building may be erected, or who at said times shall have contracted to purchase the same by a valid and enforceable contract of purchase, or by his successor in title by will or descent.

(c) Use or occupancy by a member of the immediate family, or servant, lodger, boarder, lessee or tenant of any person described in paragraph (b) at any or all times during his concurrent ownership and residence in or on the building or lot.

(d) Use or occupancy during the period of the tenancy or lease, by a life tenant, lessee for a term of years or other lessee of the used or occupied building or lot, such tenant

or lessee being of the white race, or by the successor in title of any such lessee by will or descent, in cases in which the tenancy or lease was created before August 4, 1926 and was unexpired and in force and effect at said time.

(e) Use or occupancy by a person described in paragraph (d) during the period of an extension of renewal of any such lease, in cases in which the right of renewal or extension was created previous to and was in force and effect on August 4, 1926.

(f) Use or occupancy by a member of the immediate family, or servant, lodger, boarder, lessee or tenant of any person described in paragraph (d), at any and all times at which both the tenancy, lease, renewal or extension described in paragraph (d) and (e) shall be in full force and effect, and said person himself resides in or on the building or lot.

(g) Continuance, after August 4, 1926, of the residential use or occupancy of a building by persons of the white race, in any case in which such building is used or occupied for residential purposes by persons of the white race or, if such building was vacant at said time, then in any case in which the last such use or occupancy previous to said time was by persons of the white race. (Ord. 1101-C, Sec. 10).

ORDINANCE NO. 709-F

BE IT ORDAINED By the Commission of the City of Birmingham that:

Section 1. The Commission finds as a matter of fact that:

(a) From the date of the original settlement of this City unto the present time it has been the invariable custom, supported for most of that time by municipal law and universally observed, to require white and colored residents to live in separate residential areas; and

(b) That when attempts have been made by members of one race to enter for purposes of a permanent residence into an area commonly recognized as set aside for members

of the other race, violence, disturbances of the peace, destruction of property and life has resulted almost without exception; and

(c) This Commission further finds from its knowledge of present conditions and public sentiment in this City that in the event attempts shall now or in the foreseeable future be made by members of one race to establish residences in areas heretofore regarded as set apart for the residences of members of the other race, breaches of the peace, riots, destruction of property and life will follow; and

(d) That neither the City of Birmingham nor any other law enforcement agency is able so completely to police, supervise and safeguard the person and property of persons attempting to establish a residence in an area not commonly recognized as an area to be occupied by members of the race to which such person belongs, as to prevent injury to such persons, members of his family, third parties in the are affected, and destruction of property; and

(e) That the Zoning ordinances of the City of Birmingham now in effect do substantially and fairly well delineate those areas historically and generally regarded as available for residences and occupation by members of the white and colored races; and

(f) That this ordinance is necessary to preserve the peace of said City and to safeguard the property and safety of its citizens and of the public in general.

Now, therefore, BE IT ORDAINED:

Section 2. That it shall be a misdemeanor for a member of the white race to move into, for the purpose of establishing a permanent residence, or, having moved into, to continue to reside in an area in the City of Birmingham generally and historically recognized at the time as an area for occupancy by members of the colored race; and

Section 3. That it shall be a misdemeanor for a member of the colored race to move into, for the purpose of establishing a permanent residence, or having moved into, to

continue to reside in an area in the City of Birmingham generally and historically recognized at the time as an area for occupancy by members of the white race.

Section 4. The words "permanent residence" as used herein shall be construed as meaning the occupancy of a house or tenement for more than twenty-four hours, except a house or tenement which is appurtenant to, used in connection with, and a part of the curtilage of another house or tenement and occupied by a person who shall be in the employ of the person occupying the residence or tenement to which it is appurtenant.

Section 5. The moving into for the purpose of establishing a permanent residence shall constitute a separate offense from remaining there, and remaining in residence in a forbidden area for each twenty-four hour period shall constitute a separate offense.

Section 6. This Ordinance shall take effect immediately, the public welfare requiring.

STATE OF ALABAMA
JEFFERSON COUNTY

I, Eunice S. Hewes, City Clerk of the City of Birmingham, do hereby certify that the above is a true and correct copy of an ordinance duly adopted by the Commission of the City of Birmingham at its meeting held August 9, 1949, and as same appears of record in Minute Book A-32 of said City.

GIVEN UNDER MY HAND AND CORPORATE SEAL of the City of Birmingham, this the 3rd day of November, 1949.

EUNICE S. HEWES, *City Clerk.*

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 13,158

CITY OF BIRMINGHAM, ET AL,
Appellants,

versus

MARY MEANS MONK, ET AL,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

(December 19, 1950)

Before McCORD, BORAH, and RUSSELL, Circuit Judges.

BORAH, Circuit Judge. This is an appeal from a final judgment in an action brought by Mary Means Monk and several other Negro citizens of the United States, residents of the City of Birmingham, Alabama, in their own behalf and in behalf of other Negroes similarly situated, against the City of Birmingham, James W. Morgan, a city commissioner, and H. E. Hagood, city building inspector, praying for a declaratory judgment that certain zoning laws of the

City are unconstitutional and void as violative of the Fourteenth Amendment to the Constitution of the United States, and for an injunction against defendants forever restraining and enjoining them from enforcing said ordinances.

The complaint alleges that plaintiffs own certain real property located in the City of Birmingham which is subject to the provisions of Sections 1604 and 1605 of the General City Code of Birmingham, 1944, and supplementary ordinance No. 709-F. Sections 1604 and 1605 are a part of the basic zoning law of the City. With some minor exceptions, not here important, they make it unlawful for a Negro to occupy property for residential purposes in an area zoned A-1 or white residential, or for a white person to occupy property for residential purposes in an area zoned B-1 or Negro residential. Ordinance No. 709-F, Section 3, provides: "That it shall be a misdemeanor for a member of the colored race to move into, for the purpose of establishing a permanent residence, or having moved into, to continue to reside in an area in the City of Birmingham generally and historically recognized at the time as an area for occupancy by members of the white race." These provisions of the ordinances are assailed on the ground that they deny to plaintiffs and others similarly situated the right to occupy, enjoy and dispose of their property solely because of their race and color in violation of the rights guaranteed to plaintiffs by the Fourteenth Amendment and Sections 41 and 42 of Title 8, United States Code. And the relief prayed for is that the court enjoin the enforcement of the challenged Sections 1604 and 1605 of the City Code and Ordinance No. 709-F and render judgment declaring said ordinances unconstitutional, null and void. The answer of defendants denies that plaintiffs are prevented from occupying their property solely because of their race or color and sets up that the classification of certain areas in the City of Birmingham in its

zoning ordinances as white resident sections and Negro resident sections "is based and justified in part upon the difference between the white and Negro races and not solely upon race and color," and denies that the ordinances are unconstitutional and invalid. The defendants further aver that the zoning ordinances are a valid and legal exercise of the police power of the City of Birmingham which by specific statutory enactment is commensurate with the police power of the State of Alabama and is a power that is inalienable and cannot be surrendered by the City of Birmingham, Alabama, or by the State of Alabama.

The case was tried before the Court without a jury and thereafter the judge made findings of fact and conclusions of law unfavorable to defendants, and on December 16, 1949, entered a decree declaring the ordinances unconstitutional and void, and enjoining their enforcement.

The trial court found that plaintiffs are the owners of the real estate described in their complaint and that each of them purchased their property for the purpose of occupying it as a residence; that these properties are affected by and subject to the provisions of the ordinances in question and are located in sections of the City which are, by virtue of the zoning ordinances, reserved exclusively for occupation by white persons; that neither the plaintiffs nor other members of the Negro race will be permitted to occupy said property for dwelling purposes solely because they are Negroes; that none of the plaintiffs will be permitted by the City to construct residences on their property to be occupied by them or any member of the Negro race because the City will not issue building permits solely because the ordinances in question limit the occupancy of such properties to members of the white race; that it is the established and universal custom of the City officials to deny building permits to construct residences for Negro occupancy in districts zoned for white occupancy; and that if dwellings were erected on the properties the plaintiffs

or other Negroes could not occupy them without becoming subject, under the provisions of the ordinances, to criminal prosecution, fine and imprisonment, solely on account of the fact that they are members of the Negro race. These findings are fully supported by the evidence and are not challenged on this appeal.

Appellants are here insisting that the judgment should be reversed and that the trial court erred in excluding certain evidence. These are the only errors assigned.

The important question presented by this appeal is whether or not the zoning laws and supplemental ordinance in question constitute a legitimate exercise of the police power of the State, as claimed by appellants, or are unconstitutional and void as violative of the Fourteenth Amendment to the Constitution of the United States, as contended by appellees.

The property rights of plaintiffs are here directly involved. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.[1] One of the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment was freedom from discrimination by the States and their municipalities in the enjoyment of property rights. The Fourteenth Amendment prevents State interference with property rights save by due process of law and "property is more than the mere thing which a person owns," it includes the right to use, acquire and dispose of it and more specifically the right to residential occupancy for lawful purposes without discriminatory restriction. It is true, as urged by appellants, that the State and its municipalities in the exercise of those police powers that were reserved at the time of the adoption of the Constitution has wide discretion in determining its own public policy and what means are necessary for its own protection and properly to promote the safety, peace,

[1] *Missouri Ex Rel Gaines v. Canada*, 305 U. S. 337, 351; *Sweatt v. Painter*, 339 U. S. 629, 635.

public health, convenience and good order of its people. But it is equally true that the police power, however broad and extensive, is not above the Constitution. When it speaks its voice must be heeded and it is the obligation of this court so to declare. But we need not labor the point for the precise question presented here is foreclosed by the decisions of the courts, both Federal and State. *Buchanan v. Warley,* 245 U. S. 60; *Tyler v. Harmon,* 104 So. 200; 273 U. S. 668; *City of Richmond v. Dean,* 37 F. (2) 712; affirmed 281 U. S. 704; *Shelley v. Kraemer,* 334 U. S. 1, 11; and the Courts of Georgia, Maryland, North Carolina, Oklahoma, Texas, and Virginia have also declared similar statutes invalid as being in contravension of the Fourteenth Amendment. *Glover v. Atlanta,* 148 Ga. 285, 96 S. E. 562 (1918); *Jackson v. State,* 132 Md. 311, 103 A. 910 (1918); ***Clinard v. Winston-Salem,*** 217 N. C. 119, 6 S. E. (2) 867 (1940); *Allen v. Oklahoma City,* 175 Okla. 421, 52 P. (2) 1054 (1936); *Liberty Annex Corp. v. Dallas,* 289 S. W. 1067 (Tex. Civ. App. 1927); *Irvine v. Clifton Forge,* 124 Va. 781, 97 S. E. 310 (1918).

In *Buchanan v. Warley, supra,* the Supreme Court in considering an ordinance of the City of Louisville, which it held to be unconstitutional, said that Colored persons have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color. In an effort to avoid the impact of this decision appellants insist that the *Buchanan* case involved the right to dispose of property and not, as in the case at bar, the right of occupancy. The Supreme Court of Louisiana, in considering an ordinance of the City of New Orleans in the case of *Tyler v. Harmon,* 104 So. 200, also attempted to distinguish the *Buchanan* case on the same ground and found that the underlying reasons which prompted the Supreme Court to hold the ordinance of the City of Louisville unconstitutional were not pertinent to the ordinance of the City of New Orleans because there

was nothing in the New Orleans ordinance forbidding "a white man to sell his property to a colored man, or forbidding a colored man to sell to a white man" in any community or neighborhood. On that basis, the Supreme Court of Louisiana held the ordinance of the City of New Orleans valid in so far as it forbade Negro tenants to occupy defendant's cottages in a white community. On appeal, the Supreme Court reversed, finding the citation of *Buchanan v. Warley, supra,* sufficient to support its judgment. *Harmon v. Tyler,* 273 U. S. 668. The principle established in these cases was thereafter followed in *City of Richmond v. Dean,* 37 F. (2) 712; affirmed 281 U. S. 704. And in the recent case of *Shelley v. Kraemer,* 334 U. S. 1, 11, the Supreme Court in considering restrictions on the right of occupancy which had been created by private agreements again stated that legislation imposing restrictions on the right of occupancy solely because of color cannot be squared with the requirements of the Fourteenth Amendment.

We find no merit in appellant's further contention that the court below erred in excluding certain evidence of a social and economic character. This evidence was irrelevant and immaterial to the issue of constitutionality.

There being no error, it follows that the decree below must be and it is

AFFIRMED.

RUSSELL, Circuit Judge, dissenting: The proposition that State law or ordinances are generally unenforceable when their operation is contrary to the Federal Constitution of course can not be disputed. However it is not true that every limitation or restriction of such a right is in all events subject to be struck down without determination of the law and facts then obtaining and giving rise to the enactment. In this case, the finding of the City Commission in its ordinance of August, 1949, which supplemented the

general zoning ordinance of Birmingham of 1926, that in the prevailing situation "breaches of the peace, riots, destruction of property and life," which neither the City nor other law enforcement officers could prevent, would follow attempts to violate the zoning restrictions, was entitled to some consideration. Even if the ordinance with such findings was nevertheless *prima facie* invalid upon constitutional grounds, the enactment should not have been destroyed unless and until the Court found that no sufficient danger was present to justify the dire apprehension of the Commission or to support its enactment. The Court could not judicially know, contrary to the findings of the legislative body, whether conditions in Birmingham were as declared by such body, though it is to be hoped that such findings were and are exaggerated. However, if the findings were established by evidence, declining to enjoin the enforcement of the ordinance *would only give primacy to true general welfare over private rights*—resulting from a determination of whose right should be subordinated, at least for the time being. To properly appraise the situation the Court should have heard the evidence offered in support of the legislative determination. Constitutionality may, and frequently does, depend upon particular circumstances. I disapprove the holding implying that whatever the danger to the public welfare, it must be suffered and endured when opposed by the assertion of a constitutional right to use one's property without restriction. I do not understand *Buchanan v. Warley*, 245 U. S. 60, to require such a holding.

Other constitutional rights have been restricted because of the circumstances in which they were sought to be exercised. There comes to mind Mr. Justice Holmes' oft repeated utterance in *Schenck v. U. S.*, 249 U. S. 47, that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," and the principle of clear and present danger an-

nounced following it. Vested property rights (also constitutionally protected) have been forced to yield to zoning ordinances which were determined not arbitrary or unreasonable. *Hadacheck v. Los Angeles,* 239 U. S. 394; *Pierce Oil Corp. v. Hope,* 248 U. S. 498; *Standard Oil Company v. City of Tallahassee,* 183 F. 2d 410.

If the legislative finding that an emergency existed was to be overlooked or disregarded, the city should have been allowed to introduce evidence of the true situation. Thereupon the Court could have determined the foundation and extent of danger and adjudged accordingly.

A True copy:
Teste:

Clerk of the United States Court of
Appeals for the Fifth Circuit.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

NO.....

CITY OF BIRMINGHAM, ET AL,
Petitioners (Appellants below)

vs.

MARY MEANS MONK, ET AL,
Respondents (Appellees below)

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT OF APPEALS FOR THE FIFTH CIRCUIT

HORACE C. WILKINSON
Special Counsel for Petitioners

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HORACE C. WILKINSON
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BRIEF

In Support of Petition for Writ of Certiorari

1.

The Circuit Court of Appeals decided an important question of federal constitutional law with the respect of the applicability of the Fourteenth Amendment to laws establishing equitable residential segregation which has not been but should be settled by this Court.

The Circuit Court of Appeals and the District Court each mistakenly assumed that this case is controlled by the decision in *Buchanan v. Warley,* 245 U. S. 60, and a number of state and federal cases which allegedly follow it.

It may be conceded that there are expressions in the opinion in *Buchanan v. Warley,* supra, which might be interpreted as indicating that this Court might be inclined against the position of the City of Birmingham in this case. However, "All is not gold that glitters"—even in an opinion of this Honorable Court. General expressions—if they go beyond the case—"ought not to control the judgment in a subsequent suit when the very point is presented for decision."

Cohens v. Virginia, 19 U. S. (6 Wheaton) 264.

Buchanan v. Warley, supra, and the other cases cited in the majority opinion of the Circuit Court of Appeals vanish as authorities in the light of the rule that dictum ought not to control the judgment in a subsequent case.

Buchanan v. Warley, supra, and *Harmon v. Tyler,* 273 U. S. 668, did not involve the validity of comprehensive equitable residential segregation under an ordinance necessary to preserve the public peace and to safeguard the property and safety of the citizens of a large municipality.

Buchanan v. Warley involved the right of a white seller to dispose of his property free from restrictions as to potential purchasers based on considerations of race or color.

Shelley v. Kraemer, 334 U. S. 1.

Shelley v. Kraemer, supra, involved state enforcement of restrictive covenants which required the divestment of title of any person who used his property in violation of the restriction. The court was careful to point out that the covenants involved did not seek to prescribe any particular use of the affected properties. The reverse is true in the case at bar.

The statement attributed to this Court by the Court of Appeals in commenting on *Shelley v. Kraemer,* supra, to the effect that this Court there stated:

> "That legislation imposing restrictions on the right to occupy solely because of color cannot be squared with the requirements of the Fourteenth Amendment."

was an expression beyond the case and should be considered in light of what was not involved. An equitable residential segregation zoning law was not involved and the statement quoted does not apply to a case in which it satisfactorily appears that the public welfare requires such legislation.

The evil in imposing restrictions on the right of occupancy must be balanced against the gravity of the threatened harm and discounted by its improbability.

U. S. v. Dennis, 183 Fed. (2d) 201, 212.

And that depends on evidence.

Supporting facts essential to a decision of constitutional questions of novel and far reaching importance should be definitely found by the lower court upon adequate evidence.

Nectow v. City of Cambridge, 277 U. S. 183;
Bordens Co. v. Baldwin, 293 U. S. 194;
U. S. v. Carolene Products Co., 304 U. S. 144;
Gompers v. U. S., 233 U. S. 604.

We attempted in the District Court to show actual, direct, serious, injury to the City of Birmingham, as well as injury of the same character to its inhabitants. The District Court and the Circuit Court of Appeals declined to allow us to do so.

In this connection it is significant that no writer of repute, so far as we have been able to find, has ever claimed that equitable residential segregation has ever produced riots, bloodshed, loss of life, dimunition of public revenue, depressed property values or mongrelization. On the other hand, the evidence is mountain high that in the absence of equitable residential segregation, attempted invasion of white residential sections by negroes, and in a number of instances, the attempted invasion of negro neighborhoods by whites, has almost without exception produced race riots, increased racial tension, and resulted in loss of life and damage to property, and depressed property values, in such widely scattered areas as New York, Illinois, Michigan, California, Georgia, Kansas, Texas, Tennessee, Pennsylvania, Oklahoma, Missouri, Ohio, Arizona, Louisiana and elsewhere.

There is a natural disposition to self segregation and the zoning law protects race preferences and race privileges of both races which merit protection.

The Fourteenth Amendment embraces two concepts of liberty—absolute rights and restrictable rights.

Cantwell v. Connecticut, 310 U. S. 296.

The right to own real property is absolute but,

"Ownership does not always mean absolute dominion."
Marsh v. Alabama, 326 U. S. 501-517.

If the right to use property is equal in dignity to the right to own it, that is to say, that if the right to use is an absolute and not a restrictable right, then we could never have a zoning law.

Legislation cannot be judged by theoretical standards; it must be tested by the concrete conditions which induced it.

Mutual Loan Company v. Martell, 222 U. S. 225.
Tanner v. Little, 240 U. S. 369.
Yeiser v. Dysart, et al, 267 U. S. 540.

The right to occupy—to use real property for a particular purpose is restrictable under the police power.

Euclid v. Ambler Realty Co., 272 U. S. 365.
Pierce Oil Co. v. Hope, 248 U. S. 498.
Hadacheck v. Sebastian, 239 U. S. 394.
Reinman v. Little Rock, 237 U. S. 171.
Munn v. Illinois, 94 U. S. 113.
Standard Oil Co. v. Tallahassee, 183 F. (2d) 410.

Reasonable restraints upon the use of real property are not inhibited by the Fourteenth Amendment.

"Although one owns property, he may not do with it as he pleases, any more than he may act in accordance with his personal desires. As the interest of society justifies restraints *upon individual conduct*, so, also does it justify restraints upon the use to which property may be devoted."

State ex rel Carter v. Harper, 182 Wisc: 148, 196 N. W. 451, 33 A. L. R. 269.
Euclid v. Ambler, supra.
Muller v. Oregon, 208 U. S. 412.
Jacobson v. Massachusetts, 197 U. S. 11.
West Coast Hotel Co. v. Parrish, 300 U. S. 379.

Most immoral persons have an absolute right to own real property, but even the Pope of Rome has no right to devote property of the church to immoral purposes.

The appraisal authorities hold that residential property values depreciate from twenty-five to forty percent in the absence of equitable residential segregation. See the "Appraisal Journal," January, 1944 and February, 1940; "Principles of City Land Values" (Hurd) 77-78.

In 21 Illinois Law Review 716, it is pointed out that restrictions aid rather than restrict free alienation of residential property. Business property is selected by a man from an economic standpoint and residential property by a woman from a social standpoint.

"Principles of City Land Values," (Hurd) 77-78.

In the 21 Illinois Law Review at page 176 it is pointed out that where there is no residential segregation the fear of negro invasion materially interferes with the profitable sale of homes. The conclusion is supported by findings of the New York Commission on the condition of the colored population, page 74, Pennsylvania Commission on the condition of the urban population, page 131, the Interracial Commission of the State of Minnesota reported in the July 27, 1947 issue of the ((New York Times."

Leslie Vallie, writing in "Collier's Weekly," November 23, 1946 on the situation in Detroit said, "Residential segregation has been given federal sanction in San Francisco, Richmond, Sacramento and smaller places in California and in Vancouver, Bremerton, Fort Washington, Renton, and Tacoma."

Segregation enables a negro to find among his own people as many opportunities in the higher walks of life as is found among the white people. *In many southern states, there are more negroes holding high positions in professional life than in the entire territory of Brazil, where there is no segregation.*

In *Dorsey v. Stuyvesant Town Corp.*, 87 N. E. (2d) 241, the company admitted its policy of racial exclusion and asserted that the successful operation of its project and the safety of the investment of funds required that negroes should not be accepted as tenants in this project. (Yale Law Review, Volume 57, Page 439).

In the "Appraisal Journal," the American Institute of Real Estate Appraisers explains to the real estate fraternity why white area is "blighted" because a negro family moves in.

> "Why is an area blighted because a Negro family moves in? What does the presence of several Negro families in a block do to the rental return on a given property? What happens to the block or more of housing which lies between the 'all-white' and the 'all-black' groups?
>
> "Why must there always be this sharply drawn line between the groups. And in searching for the answer we come at once upon the subject of miscegenation. It is the 'end-all' argument behind which non-thinking people retire. From a psychological, social, and biological standpoint marriage between the races does stand as a barrier to complete fraternity and it is a locked door against equality. It is a mountain in the pathway of the forward moving forces, but it is a mountain which neither white nor black would wish to see moved. Like unto like is a law which carries terrible penalties if broken."

In the "Review of the Society of Residential Appraisers," Louis M. Pratt of Pasadena, California, points out the advantages of segregation in the following language:

> "In a mostly black district, values will be higher and much more stabilized, and property more salable than in a neighborhood in a transitional stage from white to colored. Even shacks are salable in a black district. But let one Negro move into a white district and it puts a quietus on all sales of nearby residences."

In S. Andil Finebert's "Punishment Without Crime," Pages 97-98 (1949), the author points out that honest appraisers follow economic laws, saying:

> "The Federal Housing Administration in guaranteeing mortgages has followed the practice of respecting local racial patterns instituted by an earlier government agency, the Home Owner's Loan Corporation. The FHA 'Underwriting Manual' of 1947 reads: 'If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes.' Valuators are advised in the Manual that deeds should include 'Prohibition of the occupancy of properties except by the race for which they are intended.' In response to public pressure the Federal Housing Administration eliminated these strictures. But the removal of such provisions from the written code does not necessarily alter the practices of FHA appraisers, who consider the mingling of racial groups an unacceptable risk." (PP. 97-98).

Numerous special city commissions have made surveys and reports on social economic conditions relating to racial problems. The conclusions of these commissions have been almost identical. An example follows. The Chicago Commission on Race Relations reported that:

> "One of the strongest influences in creating and fostering race antagonism in Chicago is the general belief among whites that the presence of Negroes in a neighborhood inevitably and alone depreciates the market value of real estate, and this belief is commonly accepted as a valid reason for unfriendliness toward Negroes as individuals and as a race." (Page 41).

> "A large segment of the population believes that it gains from residential segregation. For the majority of northern urban dwellers, spatial separation of Negroes and whites has become a symbol of protection against Negro neighbors." The Negro Ghetto, Page 272.

The whole subject is admirably summed up in the following language lifted from Page 218 of Negro Housing:

> "So men still argue that every man's house is his castle, and that property rights give entire control of everything within the boundaries of any plot of land down through to China and up to the sky. Most men, however, have been convinced by common sense and experience that many individual preferences must be surrendered for the common good. *Four thousand years ago Confucius, the wise man of Shantung, said: 'The value of thy house, dependeth on thy neighbor.'* Problems of 'health, safety, morals and general welfare' make the old adage apply with great force to every piece of property in a city where overcrowded streets, land and houses compel the observance of laws which restrict, but at the same time give protection."

We have been unable to find any case intimating that the right to use property should be permitted to plague the average or dominant human sensibilities.

Segregation *per se*, is not prohibited by the Constitution of the United States.

Plessy v. Ferguson, 163 U. S. 537.
Gaines v. Canada, 305 U. S. 337.
Cumming v. Richmond County Board of Education, 175 U. S. 528.
Gong Lum v. Rice, 275 U. S. 78.

Personal rights are restrictable. The right to live on a particular piece of land is of no higher character than the personal right to live without being sterilized, - -

Buck v. Bell, 274 U. S. 200.

or the personal right to work long hours. - -

Muller v. Oregon, 208 U. S. 412.

The state may require separation of the races in schools.

Alabama Constitution (1901) Sec. 256.
Plessy v. Ferguson, supra.
Gaines v. Canada, supra.
Cumming v. Richmond County.
Board of Education, supra.

In parks, playgrounds, swimming pools, and golf courses.

Boyer v. Garrett, 88 Fed. Supp. 353.

The state may prohibit intermarriage between whites and negroes.

Alabama Constitution (1901) Sec. 102.
Pace v. State, 69 Ala. 231, 106 U. S. 583.
Plessy v. Ferguson, supra.
Story v. State, 178 Ala. 98; 59 So. 481.

Equitable residential segregation has been approved by state and federal courts.

Favors v. Randall, (DC Pa.) 40 F. Supp. 743.
Denard v. Housing Authority of Fort Smith, 203 Ark. 1050, 159 S. W. (2d) 764.
Housing Authority v. Higginbotham, 143 S. W. (2d) 95.

The racial descent of a citizen may furnish a valid basis, under the circumstances, for legislation restricting personal rights.

Oyama v. California, supra.
Hirabayshi v. U. S., supra.
Korematsu v. U. S., supra.

In adjusting legislation to the need of the people of a State, the legislature has a wide discretion and it may be fully conceded that perfect uniformity of treatment of all

persons is neither practical nor desirable, that classification of persons is constantly necessary. Classification is the most inveterate of our reasoning processes. We can scarcely think or speak without consciously or unconsciously exercising it. It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand.

Truax v. Corrigan, 257 U. S. 312.

Our immigration laws and alien land laws are based on race. The Federal Government is a government of limited powers. Is its limited powers not greater than the retained powers of the States? The nation cannot deny to the States a basis for legislation protecting the public welfare which the nation itself uses in protecting the national welfare.

Article X—
Constitution of the United States.

The police power may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.

Noble State Bank v. Haskell, 219 U. S. 104.

One of the most important and useful purposes of the Birmingham Ordinances is the socially desirable result of deterring amalgamation. That the intermarriage and consequent blending of some races, or of related groups within certain large racial categories, is not objectionable is generally accepted. But the amalgamation of such races as the Germanic and Anglo-Saxon on the one hand and the Negro race on the other is decidedly and demonstrably undesirable.

The program of the National Association for the Advancement of Colored People is stated by Professor G. A. Borgese in the Negro Digest of December, 1944, Page 31, as follows:

" . . . any step forward in the field of political and social equality, however desirable and imperative, is merely a palliative as compared with the final remedy.

* * *

" . . . All will be done only when the bedrooms open and the two bloods mix freely in many marriages, free from blame and bane.

* * *

" . . . I would believe in science as the miracle-maker. If science is trying hard, and hopefully, to contrive an artificial heart, I would be at a loss to understand why it should be overbearing or nonsensical to exact from science the lesser miracle of an artificial skin. There should be some means—by innoculation or rays, or other nondescript process—to discolor the Negro.

* * *

" . . . a proposition of this kind should be the leading thought of humanitarianism and science in their next phase of growth.

* * *

"Mixed marriages would be insured against racial nemesis by the knowledge that the treatment that was inexpensive and successful for the parent will be no less so for the progeny, with the other and less definite differential characteristics of the race merging by-and-by much more easily in the multiple miscegenation of the border zones.

* * *

" . . . The color line should blur almost past recognition in the course of the very next generations."

To like effect are statements of W. E. DuBois, Mary Bethune, Sterling A. Brown, W. E. B. DuBois, Gordon Blaine Hancock, Leslie Pinckey Hill, Langston Hughes, Rayford W. Logan, Frederick Douglas Patterson, A. Philip Randolph, George S. Schupler, Willard S. Townsend,

Charles H. Wesley, Doxey A. Wilkerson, and Roy Wilkins. Their articles in "What the Negro Wants"—University of North Carolina Press (1944)—leaves no doubt in any rational mind that Professor Borgese was right when he said that the negroes' ultimate aim is to open the bedrooms and let

> "the two bloods mix freely in many marriages, free from bane and blame."

Oliver C. Cox, in an article in The American Journal of Sociology, Volume 50, Page 351, points out that

> "Negroes, in America, at least, are working toward the end that Negroes as such shall become non-existent. "In short, they want to be known unqualifiedly as American citizens, which desire, in our capitalistic society, means assimilation and amalgamation."

If it be conceded that a municipality has a right to preserve racial integrity and to deter amalgamation, then it logically follows that it has the authority to adopt legislation that is calculated to work such results.

While a few states outside the South do not have miscegnation laws and laws against intermarriage, biological integration is frowned on there as severely as in the South. Professor Rayford Logan (Colored) of Howard University, concedes:

> "On no aspect of the race problem are most white Americans, North as well as South, so adamant as they are on their opposition to intermarriage." Page 28.

The author refers to the views of Mrs. Roosevelt and to the opinion of some biologists and anthropologists that mixed marriages do not necessarily result in an inferior offspring, and concludes:

> "Most white Americans remain nonetheless opposed to intermarriage and many of them to the abolition of

public segregation as a possible first step toward it." Page 28.

Professor Dowd points out (The Negro in American Life) that like the law of the Medes and Persians, the attitude of the Caucasian toward race intermixture with the Negro does not change.

"The attitude of the Caucasian toward intermixture with the Negro has not changed within the historic period. As far back as 700 B. C. the fair widowed Queen Dido of Carthage committed suicide rather than comply with the unnatural and selfish importunities of her subjects, to marry Larbus, the swarthy monarch of Mauritania in Africa."

Professor Henry Pratt Fairchild, Professor Emeritus of Sociology, New York University, in his book on "Race and Nationality," says that amalgamation is almost automatic when two or more racial groups are brought into juxtaposition.

"It (amalgamation) is a process that takes place almost automatically when two or more racial groups are brought into juxtaposition." Page 88.

The Professor, however, warns against experimenting with amalgamation. In speaking of that proposed solution he says:

"This solution would certainly be repugnant to a large portion of the members of both groups, and would certainly require a profound alteration in existing sentiments. What its final outcome would be in terms of national solidarity and human quality, lies entirely beyond the scope of present scientific prediction. One thing at least can be said—such a program should be adopted with great caution, because the process would be entirely irreversible. If it were discovered eventually that it was a mistaken policy, there would be nothing that could be done about it. You can no more unmix races than you can unscramble the proverbial egg. This

would seem to be an excellent case for the application of the good old maxim, in case of doubt, don't."

Human experience teaches that social and political association lead to and will bring about intermarriage between the people of different races. One follows the other as night follows the day.

Our forefathers carefully guarded racial purity in the early days.

"The State of Massachusetts had been earliest to enact a law against intermarriage between the Indian and the Anglo-Saxon. It was entitled 'An Act for the better preventing of a spurious or mixed issue.' Our forefathers, understanding the inferior character of the colored faces, refused to permit amalgamation, and visited it with the severest penalties of law. They possessed a lofty pride of race, which, in a great measure, has been lost to their descendants. Their firm resolve to preserve the purity of the race, and to continue its dominion over the land, was strengthened by the aspect presented by Central and South America, and the Spanish Isles. There the races had been received into political fellowship; the white blood had been adulterated, and government had become a by-word and reproach."—The Cradle of the Confederacy (Hodgson) 106-108.

Massachusetts did not stand alone in prohibiting miscegenation.

"In Virginia, Massachusetts, Connecticut, Maryland, and Pennsylvania, laws were passed, some still existing, to regulate, to protect and to punish Indians. In Massachusetts the intermarriage of an Indian and white was forbidden as debasing the Anglo-Saxon blood."

* * *

"Understanding perfectly the absolute sovereignty which has been claimed and exercised by the other States in this matter, Georgia repudiated definitely and finally the idea of admitting the Indian to her political family.

" . . . Not all the logic nor all the rhapsodies of the new generation of humanitarians, who looked to equal political and civil rights between the white man and the Indian could convince the bold Saxons who won their independence from Great Britain that it was their duty to adulterate their white blood and sink to a level with the descendants of the Castilian of the Southern Continent. No Federal agent to the Indian tribes could convince them that such was their duty. The Indians must go."

"The Cradle of the Confederacy," by Joseph Hodgson. Pages 106, 108.

Familiarity breeds more than contempt.

One of the earliest segregation laws upheld in this country is reported in *West Chester R. R. Co. v. Miles,* 55 Pa. St. 209 (1867), where it is stated that commingling of the races even on streetcars was pernicious for the very reason that *"the tendency of intimate social intermixture is to amalgamation contrary to the law of races."*

It has been said that "The strength of a Nation depends more upon the race than upon the Government."

In a statement before the House Committee on emigration, Dr. H. H. Loflin, an expert connected with the Carnegie Institute in Washington said:

"In the long run, military conquest by a superior people would be highly preferable to a conquest by emigration by people with inferior family stock endowments."

American Institutions and Their Preservations, by William W. Cook, Vol. 2, Page 748.

The same author in the same work at pages 567, 571, elaborates on the importance of adherence to our racial standard and he quotes Dr. Loflin in that respect as follows:

"Adherence to our racial standards is one of the essential institutions of American life. Unless this basic institution be preserved and developed the essential char-

acter and genius of other American institutions must disappear."

It is interesting to note that when the wartime manpower shortages forced a wider acceptance of negro labor and led to the decline of segregation on the job in many areas in the North, *residential segregation increased.*

In NEGRO HOUSING, Page 213, we find:

"Whatever political power the Negro exerts is derived from segregation. In several of the large cities, such as New York, Philadelphia, Chicago, and Cleveland he elects one or more members of the city council and sometimes a member of the state legislature as a result of his localized vote."

Professor Dowd in his Book, THE NEGRO IN AMERICAN LIFE, Pages 474-475, says:

"The white people outside of the South who have written about Negro segregation generally commend it as necessary and wise in sections of the country where Negro population is large."

J. M. Mecklin, of the Pittsburgh Psychological Institute, in his book, Democracy and Race Friction, expresses his opinion as follows: "Viewed from the standpoint of the good of society as a whole, laws requiring social segregation in the South are undoubtedly based upon a sound social philosophy."

A. B. Hart, of Harvard University, believes that:

"Race separation would give greater opportunities to the Negro, and reduce the contact with the lower class of whites out of which comes most of the race violence in the South.

"What does the Negro gain by segregation? He finds in the South a large field of employment open to him with little or no competition from the whites. In other words, segregation enables him to lead an easier and less strenuous existence, which insures to him a diminishing death-rate and a higher birth-rate; also, it enables him to resist the downward pressure into poverty, vice, and

crime. Above all, segregation builds up cooperation and race pride, and, by diminishing the incentive to imitate the whites, tends to bring out in the race its special aptitudes and geniuses. The progress of mankind can be best advanced by each race's developing the genius and culture peculiar to it instead of striving to imitate another."

If it was intended that the right to occupy property in a particular district as a residence should never be abridged, then the Constitution would have said so in clear and explicit language and in our humble judgment would not have left such intention to surmise and conjecture.

If evils result from a mixture and mingling of the races socially, if mixed residential zones are harmful to black and white alike, then it would seem to be a perversion of the constitution to make of it an obstacle to the prevention of evil—when the remedy does not interfere with ownership of property nor with it use—except to the extent necessary to avert the evil. Conceivably, the public welfare might be menaced more by the presence of negroes in white residential sections or the presence of whites in a negro residential section, than by the presence of a slaughter house, a glue factory, or a fertilizer plant. None of these things produce riots, or an amalgamation of the races. Members of either race may reside in their immediate vicinity and maintain their racial integrity. On the other hand, as far as we can recall, every court and every writer who has discussed the matter, are in accord on one proposition, *viz*: juxtaposition of the races results in crossing the color line and mongrelization.

CONCLUSION

The question of the application of the Fourteenth Amendment to social and economic problems is an irritating enigma. The application of the Fourteenth Amendment to those problems has, for the most part, been halting and changeable, chaotic and conflicting. The process of trial and error by which a social and economic interpretation of that Amendment is still being evolved has had certain wholesome results. The governing body of the City of Birmingham has believed for more than twenty years that equitable residential segregation is necessary to preserve the public peace and to safeguard the property and the safety of its citizens. For the same period of time, the same governing body has been of the opinion that the zoning laws of the City of Birmingham do not conflict with the Constitution of the United States. It is safe to say that the members of the City Commission are in a better position to judge of the necessity for such a measure than the members of this Court, the members of the Court of Appeals and the District Judge.

If, in truth and in fact, as we charge and verily believe, equitable residential segregation is necessary and essential to public safety, stabilized property values, proper municipal services, aleviation of racial tension, and the pursuit of happiness in Birmingham, no provision in the Constitution of the United States stands in the way.

"Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive."

* * *

"A regulatory zoning ordinance, which would be clearly valid as applied to the great cities, might be clearly invalid as applied to rural communities."

Euclid v. Ambler Company, 272 U. S. 387.

"When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State *to prevent* or punish is obvious."

Cantwell v. Connecticut, 310 U. S. 308.

Neither this court nor the District court knows what the facts are. The petitioners propose to substitute sworn testimony for political opinions.

Only an arbitrary, unnecessary restriction on the right to use property is an abridgment of the privileges and immunities of a citizen.

Respectfully submitted,
HORACE C. WILKINSON,
Special Counsel for the
City of Birmingham.

CERTIFICATE

I hereby certify that I have on this day mailed a copy of the foregoing application for a writ of certiorari and a copy of the foregoing brief to Arthur Shores, Attorney for the Respondents, properly addressed to his office in Birmingham, Alabama, postage prepaid. This the ... day of March, 1951.

HORACE C. WILKINSON

Encl